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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,972	04/08/2004	Kenneth E. Bailey JR.	030621	9539

41835 7590 01/21/2009

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EXAMINER	
ABU ALI, SHUANGYI	
ART UNIT	**PAPER NUMBER**
1793	
MAIL DATE	**DELIVERY MODE**
01/21/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/820,972	BAILEY ET AL.	
	Examiner	Art Unit	
	SHUANGYI ABU ALI	1793	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *13 November 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-35 and 46-50* is/are pending in the application.

4a) Of the above claim(s) *8,9,16,17,24,25,34 and 35* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7,10-15,18-23,26-33 and 46-50* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Status of Claims

Claims 1-50 remain for examination wherein claims 36-45 are canceled and claims 8-9,16-17,24-25,34-35 are withdrawn.

Claim Rejections - 35 USC § 103

The rejection of claims 1-7, 10-15, 18-23, 26-33, and 46-50 under 35 U.S.C. 103(a) as obvious over U.S. Patent No. 5,766,366 to Ferguson et al. , in view of U. S. Patent No. 4,407,955 to Muller et al as generally set forth in the previous office action mailed07/16/2008 stands.

The text of those sections of title 35 US Code not included in this action can be found in the prior Office Action.

Response to Arguments

Applicant's arguments filed 11/13/2008 have been fully considered but they are not persuasive. Therefore, the grounds of rejection for claims as indicated in the previous Office Action stand.

In general, applicants agues the difference between the process of the instant application and that of the prior art's. The Examiner respectfully submits the instant application is drawn to a composition. Eventhough product-by-process claims are

limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 77F.2d 695, 698,227 USPQ 964,966 (Fed. Cir. 1985) (citations omitted). Furthermore, the applicants fail to provide any factual evidence to show that the final product of prior art is different from the instant application's composition. Attorney's argument can not take the place of the evidence.

Applicants argue that the prior art fails to disclose the dry-milled starch. The Examiner respectfully submits that Ferguson et al. do not specifically disclose that the starch is made from dry mill process. However, Ferguson et al. disclose that all kinds of starch can be used in the acid modification process. Furthermore, it would have been obvious to one of ordinary skill in the art at the time of invention by applicant to use dry mill starch in the Ferguson et al. process, motivated by the fact that Muller et al., also drawn to starch treatment, disclose that starch made from dry mill process is cheap and economic (col. 2, lines 31-41). Economics alone is a basis for clear motivation. The applicants fail to provide any evidence to show the difference between Muller et al.'s dry mill starch with applicants own dry-milled stanch. Applicants' comparison of the process of how to use the dry mill starch of Muller's is irrelevant.

Applicant argues that there is no reasoning to support the reference modification. The Examiner respectfully submits that the motivation of the using dry-milled starch in

Ferguson et al. acid modification process is because the dry-milled starch is cheap. Applicant argue that it is hindsight reconstruction to expect the composition having the viscosity profile and flour composition as applicant set forth in the instant application. The Examiner respectfully submits that since the acid modified starch of Ferguson et al. is made by a process substantially identical with the process for making the starch recited in the instant claims, it is reasonably expected that the modified starch of Ferguson is similar to that of the instant claims. The burden is shifted to applicants to show the final modified starch is different. No evidence has been provided (tangible evidence). Furthermore, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicants argue that the prior art fails to disclose the process parameter based on the fat content. The Examiner respectfully submits the instant application is drawn to a composition. Eventhough product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 77F.2d 695, 698,227 USPQ 964,966 (Fed. Cir. 1985) (citations omitted).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to SHUANGYI ABU ALI whose telephone number is (571)272-6453. The examiner can normally be reached on Monday - Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo can be reached on 571-272-1233. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Michael A Marcheschi/
Primary Examiner, Art Unit 1793

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